IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 312 OF 2002.

Shri Caetano D'Souza (deceased)
through his legal representative
Miss Felicia Pinto r/o Chimbel,
Ilhas, Goa. ... Petitioner.

Versus

1. Shri Augusto D'Souza
   and his wife
2. Ana D'Souza, both r/o
   H.No. 310, Gaulem Bhat,
   Chimbel, Ilhas, Goa.
3. Maria Antonio Rosario,
   r/o H. No. 310, Gaulem
   Bhat, Chimbel, Ilhas, Goa.
4. Agostinho Carvalho (deceased)
   and his wife
5. Estefania Carvalho, r/o
   H. No. 313, Gaulem Bhat, Ilhas,
   Goa. ... Respondents.

Mr. M.B. D'Costa with Mr. J. Lobo, Advocates for the Petitioner.

Mr. J.P. Mulgaonkar, Advocate for the Respondents 1 and 2.

Mr. R. Satardekar, Advocate for the Respondent No. 3.

Coram : P.V. HARDAS, J.

Date : 15th February 2003.

ORAL JUDGMENT.

This petition has been filed by the petitioner, who is the plaintiff in Regular Civil Suit No. 67/92/C, pending on the file of the Civil Judge, Junior Division, Panaji. This petition assails the concurrent findings recorded by the two Courts below, holding that the petitioner was not entitled for the injunction as prayed for in the Civil Miscellaneous

Application No. 126/92/C. The facts as are necessary for the decision of this petition are stated as under:

2. The parties were put to notice that this petition would be decided finally at the stage of admission. Hence, rule. Rule returnable forthwith. By consent of parties, this petition is decided finally.

3. The petitioner had filed the aforesaid suit against the respondents and had filed an application for temporary injunction. The claim of the petitioner/plaintiff was that the property bearing survey no. 56/2, situated in the village Chimbel of Tiswadi Taluka was in possession and enjoyment of the petitioner/plaintiff and his predecessor since about last 70 years. According to the petitioner/plaintiff, the original landlord of the said property was the Archdiocese of Goa, Daman and Diu. The petitioner/plaintiff had earlier filed Special Civil Suit No. 26/89/A as the original landlord had started development work. The Special Civil Suit No. 26/89/A was settled inbetween the petitioner/plaintiff and the landlord and consent terms had been filed in Court and a Decree as per the consent terms came to be drawn. By virtue of the Consent Decree, Plot No. 8 came to be allotted to the petitioner/plaintiff and he became the

owner thereof. The present suit came to be filed by the petitioner/plaintiff as the respondents/defendants were interfering with the possession of the petitioner/plaintiff.

4. The respondents/defendants in reply to the injunction application of the petitioner/plaintiff, contended that they were in possession of the property and had been put in possession by the original landlord in pursuance to an Agreement of Sale. The respondents/defendants relate their possession since 1988 and further contended that the Consent Decree was a fraudulent document. They also contended that the Consent Decree was passed by the Court without jurisdiction.

5. The learned trial Court, by its Order, dated 31st August 1994, dismissed the injunction application filed by the petitioner/plaintiff, but directed the respondents/defendants not to construct anything in the area in their possession till the decision of the suit. The learned trial Court, while dismissing the application of the petitioner/plaintiff, held (1) that prima facie the Consent Decree was a nullity, since the subject matter of the said suit was outside the purview of the civil Court as the question of tenancy and the

surrender of the rights under tenancy were involved in the suit which is required to be determined under Sections 7 and 10 of the Goa, Daman and Diu Agricultural Tenancy Act 1964, (2) the respondents/defendants have established, on the basis of the affidavits and the letter, dated 8th August 1988, issued by the Procurator of the original landlord, that the respondents/defendants are in possession since 1988. The learned trial Court, thus, dismissed the injunction application.

6. The petitioner/plaintiff being aggrieved by the order of the learned trial court, filed Miscellaneous Civil Appeal No. 120 of 1994. The learned appellate Court framed the said question for consideration: whether the appellant is in possession of plot no. 8 and entitled to injunction? The appellate Court recorded a finding that merely because the plot was allotted to the appellant therein would not mean that he is in possession. The appellate Court then recorded a finding that the evidence on record indicates that there was an agreement between the Archdiocese and the respondents therein and, hence, they are in possession. The appellate Court then held that there was nothing on record to indicate that the appellant therein was in possession. The appellant therein had

not made out a prima facie case. The lower appellate Court, thus, dismissed the appeal filed by the appellant/petitioner. The appellate Court has not recorded any finding that the Consent Decree was a nullity.

7. Mr. D'Costa, learned counsel for the petitioner, has urged before me that both the Courts below have not considered the import of the Consent Decree. By virtue of the Consent Decree, the petitioner became the owner of plot No. 8 and unless the respondents placed on record material of such unimpeachable nature, the presumption would be that the petitioner, as owner, is in possession. The learned counsel for the petitioner has also urged that in the absence of any challenge to the Consent Decree, the trial Court was in error in holding the same to be a nullity. It is next submitted that assuming that there was an agreement, the respondents have not produced any material on record or an affidavit of the original landlord placing them in possession.

8. Mr. Mulgaonkar and Mr. Satardekar, learned counsel appearing on behalf of the respondents, have urged that the petition assails the concurrent finding of facts recorded by the two Courts below and, as such,

the petition deserves to be dismissed. They have also urged that the Consent Decree is a nullity and, therefore, confers no valid title on the petitioner/plaintiff. The Consent Decree was registered after lapse of time. Though this point was not raised in the reply, it was raised before the appellate Court. The counsel, therefore, urged that the petition be dismissed.

9. The earlier Civil Suit filed by the petitioner/plaintiff against the Archdiocese of Goa, was decreed as per the consent terms filed by the parties to the suit, by Judgment and Decree, dated 1st February 1992. In the consent terms there is no reference to the petitioner surrendering his tenancy rights etc.. Paragraph 3(c) of the Judgment, which incorporates the consent terms, reads that on account of the services rendered by the plaintiff (petitioner herein), the defendant No. 1 (Archdiocese of Goa, the landlord) transfers all its rights in respect of plot No. 8. The said paragraph further states that the petitioner will be considered as the owner of the said plot No. 8 from the date of the consent terms. It is urged by the learned counsel for the petitioner that the Decree has been registered. This point of non-registration of the Decree was not raised before the trial Court. It was

raised before the appellate Court. However, the appellate Court has not adverted to this point at all. According to me, this is a contentious issue which cannot be decided at the prima facie stage.

10. Apart from the letter, dated 8th August 1988, and the affidavits, there is nothing to indicate that the respondents are in possession. The respondents have not filed the affidavit of the original landlord stating as to how the respondents were placed in possession. On the contrary, the plaintiff has established his title on the basis of the Consent Decree. A consent decree cannot be ignored unless the defect is of such a nature that it stares in the face. A prima facie finding regarding the nullity of the Decree in a previous suit cannot be recorded only on the basis of the objections which require investigation and is a contentious issue. The Consent Decree has, therefore, to be accepted as prima facie conveying title to the petitioner. There was no challenge by way of a suit or counter claim to the Consent Decree. The prima facie material of the title of the respondents is woefully short. On the basis of the agreement the respondents can neither claim to be in possession nor have any title to the property. The appellate Court has not recorded any finding on the aspect of the nullity of the Decree, according to me,

rightly so. The appellate Court has proceeded on the assumption that there was no proof of the petitioner being in possession. The petitioner is admittedly the owner of the property, deriving his title on the basis of the Consent Decree. The petitioner has also filed affidavits of other persons. Apart from that, the presumption that as owner he is in possession of the property, is not displaced by the respondents/defendants by unimpeachable material. The respondents have not established that they have been put in possession by the Archdiocese by filing an affidavit in this regard. Thus, according to me, the petitioner has prima facie established that he is the owner in possession of the property and, therefore, the balance of convenience lies in his favour. The two Courts below were in error in dismissing the injunction application filed by the petitioner.

11. Two Courts have concurrently held against the petitioner. However, concurrence is not a shield against the charge of perversity. The two Courts below have completely ignored that the petitioner has prima facie established his title and his possession thereof. Thus, according to me, the Orders of the Courts below are unsustainable and deserve to be quashed and set aside.

12. Accordingly, this Writ Petition is allowed. The Orders impugned in this petition are quashed and set aside. The petitioner/plaintiff is entitled to the temporary injunction prayed for and, accordingly, the injunction application is allowed. Rule made absolute on the above terms with no order as to costs.

(P.V. HARDAS)
JUDGE.

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